A JOINT LETTER

From
Nondalton Tribal Council, Koliganik Village Council,
New Stuyahok Traditional Council, Ekwok Village Council,
Curyung Tribal Council, Levelock Village Council
Alaska Independent Fishermen's Cooperative Association, and
Trout Unlimited, Inc.

_____, 2009

DRAFT: 1/07/10
CONFIDENTIAL: Attorney-Client Privileged

Representative Bryce Edgmon
Chair, House Fisheries Committee
Alaska House of Representatives
716 W. 4th Ave. Suite 390
Anchorage AK, 99501-2133

Subjects: (1) DNR's 2005 Bristol Bay Area Plan,
(2) tribes as potential cooperating agencies on a federal EIS on Pebble mine,
(3) request that EPA being a Section 404(c) process under the Clean Water Act, and
(4) refuge or critical habitat area legislation as a substitute for HB 242.

Dear Representative Edgmon:

As you know, we are plaintiffs in a lawsuit that seeks to have the 2005 Bristol Bay Area Plan (2005 BBAP) of the Alaska Department of Natural Resources (DNR) declared unlawful.[1] The 2005 Area Plan applies to state land that could be developed for a potential Pebble mine. The litigation is in its early stages and is still undecided.

Although we are skeptical that a Pebble Mine can be permitted, developed, operated and closed forever in an environmentally safe manner, our concern here, as it is in the lawsuit, is *not* with a Pebble mine directly. Our concern is with DNR. For reasons explained in this letter and its attached briefing paper, DNR's 2005 BBAP makes it difficult, if not impossible, for a reasonable person to conclude that DNR can deal appropriately with a proposed Pebble mine, particularly under the 2005 BBAP. So, today we are taking three additional steps.

First, the tribes that are signatory to this letter have government-to-government relations with the United States. Through counsel, the tribes have requested that they and the US Army Corps of Engineers and the US Environmental Protection Agency (EPA) commence discussions about the tribes being cooperating agencies on any federal environmental impact statement (EIS) on a proposed Pebble mine.[2] Cooperating agency status may be a vehicle by which federal and state agencies involved in an EIS will benefit from the tribes' perspective that the DNR's 2005 BBAP is inadequate and an unreliable basis for decision-making, including with respect to habitat, subsistence, and many other interests.

[1] *Nondalton Tribal Council, et al. v. State, Department of Natural Resources, et al.*, 3DI-09-46 CI.
[2] *See* enclosed letter from counsel to the Corps and USEPA.

Second, the tribes have requested that EPA commence a public process under Section 404(c) of the federal Clean Water Act. Under a 404(c) process, EPA may designate waters and wetlands where the use of them for waste disposal by a potential Pebble mine would be prohibited or restricted. Section 404(c) empowers EPA do so before the Pebble Limited Partnership (PLP) submits applications based on the 2005 BBAP and that would in part be adjudicated under the 2005 BBAP (unless it is overturned by the litigation, or otherwise revised).[3] If EPA commences a Section 404(c) process, then all parties will benefit if EPA does so *before*, not *after*, PLP submits applications.

Third, for you, the House Fisheries Committee, and the Alaska legislature, we are enclosing two, alternative, draft bills that would designate most state land in the Nushagak and Kvichak drainages as either a state critical habitat area, or a state fish and game refuge.[4] They are drafted to protect fish and wildlife habitat and commercial, subsistence, and recreational uses of fish and game. Both drafts would include land covered by a potential Pebble mine. Both would shift most functions of managing most state land in these drainages from DNR to the Alaska Department of Fish and Game (ADF&G). We ask that you submit each to the House Fisheries Committee as a potential substitute for HB 242. To facilitate that, we have attached a briefing paper. It explains many of our reasons for offering such legislation and that are *independent* of whether or not a Pebble mine can be permitted, operated and closed in an environmentally safe manner.[5] The public deserves opportunities to speak to such legislation. In contrast, HB 242 leaves decision-making with DNR and does not address a vast array of concerns arising from the 2005 BBAP.

In sum, we are pursuing four courses of action to restore balance lacking in DNR's 2005 BBAP. We are pursuing: (1) a lawsuit to overturn the 2005 BBAP; (2) tribal cooperating agency status on an EIS so that federal agencies receive perspectives of both DNR and the tribes in their respective government-to-government relationships; (3) a Section 404(c) process under the federal Clean Water Act; and (4) state legislation that would protect fish and wildlife habitat and commercial, subsistence, and recreational uses of fish and game, and would shift most functions of managing most state land in the Kvichak and Nushagak drainages from DNR to ADF&G.

For legislators to address this situation, we recommend that they familiarize themselves with (1) the function of area plans in general, and (2) the methods DNR employs in its 2005 BBAP to facilitate a Pebble mine.

With respect to area plans in general, they: (1) designate primary uses of state land and classify the land accordingly (*e.g.*, as habitat, mineral, recreation, settlement land, etc.); (2) adopt guidelines and statements of management intent that guide DNR's decisions; and (3) last for about 20 years unless revised. Designated primary uses take precedence over undesignated or secondary uses. Classifications such as habitat, mineral, recreation, transportation, forestry, grazing, etc. retain land in public ownership. Classifications such as resource management land and settlement land do not carry this requirement.

[3] *See* enclosed letter from tribes to USEPA.

[4] If the tribes become cooperating agencies, they may decide to support a range of alternatives in a draft EIS being released to the public *only if* each alternative rests upon prior enactment of legislation establishing a refuge or critical habitat area, managed by ADF&G, and applying to most of the Kvichak and Nushagak drainages, including the land at issue in any proposed Pebble mine.

[5] The reasons stated in the briefing paper are also consistent with the tribes seeking a cooperating agency status on an EIS and urging that EPA commence a Section 404(c) process.

With respect to DNR's 2005 Bristol Bay Area Plan specifically, it facilitates a Pebble mine by strategies such as these to reclassify land:

- DNR's 2005 BBAP uses primarily *marine* criteria, such as whether land is a walrus haulout, to identify whether *inland uplands*, such as those at Pebble, qualify for a habitat land classfication. No legislator should support using marine criteria to determine whether inland uplands qualify for classification as habitat.

- DNR's predominantly marine criteria *excluded moose and caribou and their habitats* from habitat designation. Every legislator knows that moose and caribou are important.

- DNR lacks a land use classification category for land used for *subsistence hunting and fishing,* but DNR has a "public recreation land" classification category that by regulation includes land used for *sport hunting and fishing*. No legislator should support having a land use classification category for sport fishing and hunting but not for subsistence hunting and fishing.[6]

- DNR's 2005 BBAP defines "recreation" as *excluding sport hunting and fishing* for purposes of developing the Plan, classifications, guidelines and statements of intent. No legislator should support excluding sport fishing and hunting from "recreation."[7]

- DNR's 2005 BBAP defines "subsistence uses" for purposes of state land management (not fish and game harvest management) as limited to residents "domiciled in a *rural* area of the state."[8] Regardless of whether this conflicts with *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (which holds that the State cannot limit subsistence benefits to rural residents), this definition puts in an untenable position those legislators who *oppose* a rural preference in the harvest fish and game, and *support* a proposed Pebble mine proceeding through a permitting process that depends on the 2005 BBAP. They will be *supporting* Pebble mine going through a permitting process that depends in part on "subsistence uses" being defined for purposes of state land management in terms of residents "domiciled in a *rural* area of the state."

- DNR's 2005 BBAP defines "habitat" narrowly as what is necessary to prevent a "*permanent loss*" of a population or of sustained yield of a species. Defining habitat in terms of what is necessary to prevent a "permanent loss" of a population defines habitat in terms of what is necessary to *prevent extinction* from which no recovery of the

[6] DNR claims that habitat classifications accommodate subsistence, because the regulatory definition of the habitat classification category, at 11 AAC 55.230, refers to "traditional uses." Regardless of the merits of DNR's claim, the 2005 BBAP reduces the acreage classified or co-classified as habitat by 90 percent, from 12 million acres to 768,000 acres. The definition of the habitat category at 11 AAC 55.230 similarly refers to "recreational" uses, so if habitat were the means of accommodating subsistence, then no need would exist for a public recreation land classification category. DNR's claim that habitat is for subsistence imposes upon the subsistence user a necessity to understand that the habitat category is for subsistence when no similar imposition is made of sport hunters and fishers.

[7] Although the 2005 Plan claims that it protects recreation, this definition begs the question: If sport fishing and hunting are not recreation for purposes of land management, then what are they?

[8] If Pebble mine and related roads occur, then this definition may force non-rural subsistence users to compete on the same lands with rural subsistence users.

population can occur. No legislator should support that definition, because the Alaska Constitution requires sustained yield management. Further, defining habitat in terms of what is necessary to prevent a "permanent loss" of sustained yield defines habitat in a manner that ignores the conventional definition that "sustained yield" means *annual or periodic sustained yield*.[9] Again, because the Constitution requires sustained yield management, no legislator should support DNR's definition that would prevent only a "permanent loss" of sustained yield but would not assure annual or periodic yields.

These and other DNR strategies eliminated existing habitat classifications in a 1984 BBAP on caribou calving grounds at Pebble, moose wintering areas necessary for a Pebble mine, western Iliamna Lake (important for rearing sockeye salmon) into which part of the Pebble mine would drain, and led to reclassifying land in the area of a Pebble mine from "habitat" to "mineral." In effect, the area of Pebble, which is a hundred miles from the coast, lost its entire habitat classification because it produces caribou, moose, salmon, other fish and wildlife, but no walrus.

Moreover, because area plans guide land management, these and other strategies lie *at the heart* of DNR's permitting process for a potential Pebble. Hence, any state legislation, such as HB 242, that leaves land management of the Kvichak and Nushagak drainages with DNR, even with higher standards for permitting a Pebble mine, will *not* be effective for two reasons. First, such legislation does not remedy DNR's 2005 BBAP. Second, such legislation does not remedy DNR's "development above all" institutional mindset that is reflected in its 2005 BBAP.

As Alaskans and their legislators learn what DNR did in the 2005 Area Plan, we believe that most will support legislation to establish a refuge or critical habitat area in most of the Kvichak and Nushagak drainages. And, when those who support a Pebble mine learn that DNR's 2005 BBAP appears to be *fatal* to any federal environmental impact statement that would support permits for Pebble,[10] we believe that they, too, will be equally disappointed in DNR. Moreover, those who support a proposed Pebble mine going through any permitting process that depends in part on the 2005 BBAP will have to defend: (1) DNR's use of primarily *marine* criteria to identify *uplands* as habitat; (2) DNR's *exclusion of moose, caribou and their habitats* from the process of identifying habitat; (3) DNR's lack of land use classification category for *subsistence hunting and fishing,* when DNR has a "public recreation land" classification category that includes land for *sport hunting and fishing*; (4) DNR's definition of "recreation" as *excluding sport hunting and fishing* for planning purposes; (5) DNR's definition of "subsistence uses" for purposes of land management as limited to rural residents; and (6) DNR's crabbed definition of "habitat" as being what is necessary to prevent a "*permanent loss*" of a population or of sustained yield of a species.

Our enclosed draft bills contain provisions that address a potential Pebble mine. Because most people in Southwest Alaska oppose a Pebble mine, both alternative drafts would prohibit metallic sulfide mining (as Pebble mine would be) within the designated area. And because some people, mostly elsewhere in Alaska, want to see a proposed Pebble mine go through some sort of a permitting process to see if it should be developed, the drafts also contain a provision that would render this prohibition inoperative if the courts determine that the prohibition would

[9] *See*, AS 38.04.910(12), 16.05.255(k)(5), 41.17.950(27).
[10] *See* Briefing Paper, Part II, attached.

be a legislative "taking" requiring compensation to the Pebble claimants. In that event, strict permitting provisions would apply and would be implemented, not by DNR, but by ADF&G.

We chose this approach for four reasons. First, it provides to the public an *opportunity* to speak to an outright prohibition of metallic sulfide mining in much of the Kvichak and Nushagak drainages versus a conventional compatibility test. Second, it ends the *pointless* political debate over what only a *court* can decide – *i.e.*, whether some clause in legislation is or is not a "taking" that requires compensation. Third, it lets the Pebble Limited Partnership (PLP), which has asserted that various legislative provisions would result in a taking, argue their case where it *belongs* – *i.e.*, before a court – and if PLP prevails, then a severability clause and provisions for permitting would be triggered, and thereby avoid the taking and the compensation obligation. Fourth, the central provisions of any modern refuge statute are (1) the *purposes* of protecting habitat or commercial, subsistence or sport uses of fish and game, and (2) a *compatibility test* that other uses such as a Pebble mine may be permitted only if compatible with those purposes.[11] Because PLP asserts that it will not develop a Pebble mine if it would be incompatible with protecting habitat or commercial, subsistence or sport uses of fish and game,[12] our legislation gives PLP an opportunity to support those purposes and a compatibility test while opposing an outright ban of metallic sulfide mining in the affected area.

In weighing all this, state legislators and other officials might find in helpful to consider two matters. First, by the inherent nature of this situation, federal laws, regulations, authorities, interests, and obligations including to Native people, are involved. Today, those of us who represent federally-recognized tribes are seeking, through the government-to-government relationships that exist between Alaska tribes and the United States, to invoke federal assistance in resolving some issues. Second, separate from doing so, ample reasons exist for the State to enact refuge or critical habitat area legislation that are independent of whether a Pebble mine can be permitted, developed, operated, and closed forever in an environmentally safe manner. Many are set forth in the attached briefing paper, including the inadequacy of DNR's 2005 BBAP and the likelihood that it is fatal to an EIS on a potential Pebble mine.

To reiterate, for purposes of the Alaska legislature, our immediate concern is the public should be allowed to *speak* to such legislation. We appreciate your work, that of the House Fisheries Committee, and that the issues are not easy. We look forward to hearing from you, the Committee, and working together.

Sincerely yours,

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[11] Refuge and critical habitat area statutes contain compatibility tests. *See e.g.,* AS 16.20.036(c) (Susitna Flats State Game Refuge); AS 16.20.037(b)(3) (Minto Flats State Game Refuge); AS 16.20.033(b)(3) (Yakataga State Game Refuge); AS 16.20.041(b)(3) (McNeil River State Game Refuge); AS 16.20.500 (applies to all critical habitat areas); *see also* 16 U.S.C. § 668dd(d) (2000) (compatibility test applies to all national wildlife refuges), .

[12] *See*, Briefing Paper, Part V, attached.

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attachment: Briefing Paper
enclosures: (1) letter to Corps and USEPA re cooperating agency status and related matters; and
(2) letter to USEPA re Section 404(c) process.